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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LAMAR JACKSON,

Defendant and Appellant.

D053958

(Super. Ct. No. SCD190366)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh, Judge. Affirmed as modified with directions.

A jury convicted James Lamar Jackson of second degree murder. (Pen. Code,<sup>1</sup> § 187, subd. (a).) The jury also found true an allegation that Jackson used and discharged a firearm. (§§ 12022.5, subd. (a), 12022.53, subd. (d).) The trial court modified the verdict to reduce the conviction to voluntary manslaughter pursuant to *People v. Dillon* (1983) 34 Cal.3d 441. Jackson was sentenced to a determinate term of 21 years,

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

consisting of the upper term of 11 years for voluntary manslaughter, plus the upper term of 10 years for the firearm enhancement.

Jackson appealed his conviction and sentence. In an unpublished opinion in case D049784 this court affirmed the conviction but remanded the case for resentencing in light of *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*).

On remand the trial court again imposed the upper term of 11 years for voluntary manslaughter, plus the four-year middle term for the firearm enhancement. The court did not recalculate custody credits, reasoning that the calculation of credits in this case was the responsibility of the Department of Corrections and Rehabilitation.

Jackson appeals, challenging only the imposition of the upper term sentence for voluntary manslaughter. He argues that the trial court abused its discretion in selecting the upper term sentence, and that applying the procedures set forth in *Sandoval, supra*, 41 Cal.4th 825, on remand denied him due process and that the trial court should have recalculated the custody credits and should have awarded additional presentence credits under section 4019. We will reject each contention and affirm.

## FACTS

We include the facts of the underlying offense from our unpublished opinion in D049784, filed April 14, 2008.

In April 2005 appellant lived in Paradise Hills with his mother and other family members, including his cousin Robert Smith. Smith had a bad temper. At around 8:00 a.m. on April 16, 2005, appellant and Smith had an argument. At about that time

persons in a house next door to appellant heard what might have been shots and saw Smith on the ground between the houses.

The police and paramedics were called. As the police were securing the scene, a woman walked up to the officers with appellant. The woman stated appellant was her son, he had shot a relative and wanted to turn himself in. Asked about the gun used, appellant stated it was a small black .22 caliber gun. The officers searched the area where appellant stated he threw it, but could not find the weapon. However, a cartridge casing was found about an inch from a brown chair outside the house.

While the officers were searching for the gun, appellant told them he was visiting a girl and Smith came in and began bothering him. Appellant stated Smith knew he was carrying a gun. Appellant stated the gun went off accidentally. Frightened, appellant ran. Appellant stated he did not intend to shoot Smith.

Later, after waiving his rights, appellant told a detective he was inside the home of his next door neighbor. Smith came to a window and angrily stated if appellant came outside he would "beat the shit" out of him. Appellant, who had a gun in his pocket, went outside and sat in a brown chair. Smith took off his hat and shirt and angrily came at appellant. Fearing Smith would harm him, appellant pulled out his gun. The two men wrestled and the gun went off. Smith fell to the ground. Appellant went home and told his mother what happened.

Smith died from a single gunshot wound to the head. The evidence indicated the shot was fired from at least two to three feet away. Smith would have fallen to the

ground almost immediately after being shot. A criminalist examined the bullet and determined it was fired from a .25 caliber automatic firearm.

Smith had a reputation for violence. Several witnesses testified appellant did not have a history of violence and no history of violence with Smith. Smith frequently wanted to fight men for making "passes" at his girlfriend. Other witnesses testified Smith had a reputation for violence. Over the years, Smith picked several fights with appellant. The defense argued that after an argument, Smith attacked appellant and appellant shot him in self-defense.

## DISCUSSION

### *A. The Resentencing Procedure Did Not Deny Due Process.*

On remand, the trial court applied the sentencing process outlined in *Sandoval*, *supra*, 41 Cal.4th 825. Jackson contends that application of the procedure relied upon in *Sandoval* to his crimes, which were committed prior to the amendment of section 1170, denied him due process. Our Supreme Court has resolved that issue against the position Jackson advocates and therefore we will reject this challenge to his sentence.

The court in *Sandoval*, *supra*, 41 Cal.4th 825, reexamined the California Determinate Sentencing Law (DSL) after the United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. 270. The court also considered the impact of the amendment to section 1170 adopted after the *Cunningham* decision. The *Sandoval* decision concluded that defendants, whose cases were still pending at the time of the amendment of the DSL, were on notice that the maximum sentence for crimes under the DSL was the upper term sentences provided in the various statutes. The court, citing

*Rogers v. Tennessee* (2001) 532 U.S. 451, 456, concluded neither due process nor ex post facto concerns prevented application of the amended sentencing procedure under section 1170. (*Sandoval, supra*, at p. 855.) The decisions of the California Supreme Court are binding on all lower California courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we reject Jackson's due process challenge to his sentence.

*B. The Trial Court Properly Imposed the Upper Term for Voluntary Manslaughter.*

Jackson contends that even if the sentencing process mandated by *Sandoval, supra*, 41 Cal.4th 825 is lawful, the trial court abused its discretion in imposing the upper term for voluntary manslaughter. The trial court relied on several factors in imposing an upper term sentence. The court found the victim was particularly vulnerable, that Jackson violated a position of trust and that the crime actually committed by Jackson was really a second degree murder, which the court reduced for compassionate purposes to manslaughter. The court considered the latter circumstance to be an aggravating factor.

A single factor in aggravation is sufficient to support an upper term sentence. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) When a party challenges the trial court's exercise of sentencing discretion, that party bears the burden of establishing an abuse of such discretion. In other words, the appellant must show the trial court's decision was unreasonable, arbitrary, or unsupported by the record. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

This case presents an unusual set of circumstances. The jury convicted Jackson of second degree murder, meaning that the jury found the unlawful killing was

accomplished with malice aforethought. (§ 187, subd. (a).) The trial court took the statistically unusual action of reducing the crime to manslaughter pursuant to the reasoning in *People v. Dillon, supra*, 34 Cal.3d 441. Specifically, the court made its decision on its assessment of the severity of the punishment required for that crime and the court's view that the defendant did not deserve such a severe punishment.<sup>2</sup>

Several times in the sentencing hearing on remand, the trial court expressed the clear view that the crime committed was indeed a murder and that the court's decision to reduce the crime did not reflect adversely on the jury's decision. The trial court expressly found that the fact the crime was actually a murder was an "aggravant."

Murder, of course, is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a); *People v. Lasko* (2000) 23 Cal.4th 101, 107.) Malice is implied in a killing where the killer acts with conscious disregard for life, knowing such conduct endangers the life of another. In order to be convicted of second degree murder, the jury must find the element of malice to be proved beyond a reasonable doubt. (*People v. Martinez* (2007) 154 Cal.App.4th 314, 332.) Proof of malice is not required for voluntary manslaughter.

The trial court in relying on the fact that Jackson had actually committed a second degree murder was expressing the view that Jackson had already been given a benefit by the court's action to reduce the crime to manslaughter. Considering the jury verdict, the

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<sup>2</sup> The People did not appeal from the trial court's decision to reduce an otherwise valid conviction to a lesser crime. Accordingly, we express no views on the wisdom of that decision.

court reasonably found that as "manslaughter" this crime was committed with callousness. (Cal. Rules of Court (CRC), rule 4.421(a)(1).)

Given that there is clearly at least one valid factor in aggravation that supports the trial court's selection of the upper term we find it unnecessary to examine the remaining factors in detail. Suffice to note that the trial court rejected Jackson's self-serving version of the crime, which had also been rejected by the jury. The court found that Jackson did not have to go outside of his house to confront his cousin but did so anyhow, only after arming himself with a firearm. The court also rejected Jackson's claim that the gun was accidentally fired. In sum, the court found that Jackson brought a gun to the fist fight thereby making his cousin particularly vulnerable. (CRC 4.421(a)(3), (11).)

We are satisfied the trial court acted within its discretion in selecting the upper term sentence for voluntary manslaughter.

*C. The Trial Court Correctly Declined to Recalculate Custody Credits.*

Jackson contends the trial court should have recalculated his sentence credits, including conduct and work credits at the time of the resentencing. When a defendant obtains a reversal of his or her conviction and is later resentenced, the trial court must recalculate the defendant's sentence credits at the time of the resentencing. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 23 (*Buckhalter*).) However, when a defendant's case is remanded only for resentencing, the defendant is not removed from prison custody, although the person is temporarily housed in a local jail pending resentencing. (*Ibid.*; see also §§ 2930, 2933, 4019.)

In *People v. Johnson* (2004) 32 Cal.4th 260, 263, the court reaffirmed the rationale of *Buckhalter, supra*, 26 Cal.4th 20, that a prisoner returned to the trial court on a limited remand for resentencing is not entitled to presentence credits under section 4019 and that it is the responsibility of prison officials to calculate sentence credits, including work and conduct credits.

While Jackson is not entitled to have the trial court calculate conduct, work and presentence credits as he claims, he is entitled to have the trial court calculate the actual time spent in custody. The parties essentially agree that Jackson had served 1,349 days in actual custody. The abstract of judgment must be modified to reflect the actual time in custody at the time of resentencing.<sup>3</sup>

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<sup>3</sup> In his reply brief Jackson agrees with the Attorney General's calculation of actual custody time. However, without citation of authority, Jackson argues he should get an additional nine days credit due to the "invalidation of the DSL on Sixth Amendment grounds." We find no basis in this record for such additional custody credits.

## DISPOSITION

The superior court is ordered to amend the abstract of judgment to reflect 1,349 days of actual custody credits as of the time of resentencing and to forward a modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

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HUFFMAN, J.

WE CONCUR:

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McCONNELL, P. J.

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McDONALD, J.